

Case Summary

Lexus Real Estate Group, Inc. (“Lexus”), and H. Jay Snider (collectively, “Appellants”) appeal the reinstatement of a default judgment and decree of foreclosure in favor of Bullitt County Bank, Inc. (“BCB”). We affirm.

Issue

We restate the issue as whether the trial court abused its discretion in reinstating the default judgment and judgment and decree of foreclosure in favor of BCB.

Facts and Procedural History

In April 2003, Snider, as president of Lexus, executed a promissory note and a business loan agreement wherein BCB agreed to lend Lexus \$1,140,000 for the purchase of two parcels of real estate in Clark County, Indiana. Both documents list Lexus’s address as Shelbyville, Kentucky, and BCB’s address as Sheperdsville, Kentucky. Appellants’ App. at 17, 33. The promissory note states that it “will be governed by, construed and enforced in accordance with federal law and the laws of the Commonwealth of Kentucky.” *Id.* at 17. A commercial guaranty for the transaction lists the same Shelbyville, Kentucky, address for both Lexus and Snider. *Id.* at 38. The commercial guaranty states that any notice required to be given thereunder must be directed to the addresses shown on the guaranty and that “[i]f there is a lawsuit, Guarantor agrees upon Lender’s request to submit to the jurisdiction of the courts of Bullitt County, Commonwealth of Kentucky.” *Id.* at 39. The parties also executed a construction mortgage.

On August 5, 2004, BCB initiated a foreclosure action in the trial court, alleging that Appellants were in default of the promissory note, construction mortgage, and business loan

agreement. *Id.* at 11. BCB attached the above-mentioned documents to its complaint, as well as a loan payoff calculation that also lists the Appellants' address in Shelbyville, Kentucky. *Id.* at 19.¹ BCB had summonses sent via certified mail to Lexus and Snider at a Nashville, Indiana, address. The summonses were returned marked "Unclaimed/Refused." *Id.* at 44.

On October 26, 2004, BCB filed a praecipe for issuance of alias summons and service with the Indiana Secretary of State as Lexus's agent, "relative to [Lexus's] owning, using, or possessing real property or interest in real property within the state of Indiana" that is the subject of the lawsuit. *Id.* at 49.² The praecipe lists Lexus's last-known address as Nashville, Indiana. On October 29, 2004, alias summons was sent via certified mail to Lexus at the Nashville, Indiana, address. The summons was returned marked "Not Deliverable As Addressed Unable to Forward." *Id.* at 46. The Secretary of State executed an affidavit of service to this effect on November 8, 2004.

On November 19, 2004, BCB filed a praecipe for issuance of alias summons by publication. In an attached affidavit, BCB counsel Philip H. Cade stated that Snider had "refused to accept certified mail process upon the original Summons ... as such certified mail

¹ The complaint describes the loan payoff calculation as "[a] true and correct copy of Plaintiff's statement showing the balance due upon the indebtedness[.]" Appellants' App. at 11.

² "[O]wning, using, or possessing any real property or an interest in real property within this state" is a basis for jurisdiction pursuant to Indiana Trial Rule 4.4(A)(5). Trial Rule 4.4(B)(2) states that "[a] person subject to the jurisdiction of the courts of this state ... shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10." Trial Rule 4.10 states in pertinent part that "[t]he person seeking service or his attorney shall ... state the address of the person being served as filed and recorded pursuant to a statute or valid agreement, or if no such address is known, then his last known mailing address, and, if no such address is known, then such shall be stated[.]"

process was returned ... ‘Unclaimed’[,]” that “a diligent search had been made but [Snider] cannot be found in this jurisdiction[,]” and that it was Cade’s belief that Snider had left the State of Indiana. *Id.* at 54. The alias summons directed to Snider lists the Nashville, Indiana, address with the typewritten notation, “exact whereabouts unknown[,]” *Id.* at 52. On March 2, 2005, BCB filed an affidavit stating that on three separate occasions, a newspaper had published summons against Snider. *See* Ind. Trial Rule 4.13 (outlining requirements for service by publication).

Also on March 2, 2005, BCB filed an application for entry of default judgment, to which was attached an affidavit by Cade. Cade’s affidavit stated that Appellants had been served by alias summons and that Appellants had “failed to plead, appear, or otherwise comply with the Indiana Rules of Trial Procedure[,]” Appellants’ App. at 61. The trial court entered default judgment against Appellants that day. On April 15, 2005, BCB filed a motion for summary judgment.³ On June 6, 2005, attorney John H. Shean entered an appearance on Appellants’ behalf. On June 7, 2005, the trial court held a hearing on BCB’s summary judgment motion.⁴ On June 9, 2005, the trial court entered a judgment and decree of foreclosure against Appellants in the amount of \$1,179,133.53, plus attorney’s fees, interest, and costs.

On July 22, 2005, Appellants filed a motion to vacate the default judgment and summary judgment pursuant to several provisions of Indiana Trial Rule 60(B). Appellants

³ The summary judgment motion does not appear in the record before us.

alleged, *inter alia*, that BCB's "representations as to the state of the land were materially false[,] " that BCB's dealings with Appellants were "and always [had] been from Snider's residence in Shelbyville, Kentucky[,] " and that "Snider first became aware of this action after default judgment had been entered in this case." *Id.* at 80, 81. Attached to Appellants' motion was an affidavit by Snider stating that he had "never been served with a summons or a copy of the complaint[,] " that he currently resides in Kentucky, that he "do[es] not live in Indiana and [has] not lived in Indiana since 1999[,] " and that he "first learned about this case in April 2005, after a default was entered, when speaking with an acquaintance that lives in the state of Indiana." *Id.* at 85. On July 26, 2005, the trial court granted Appellants' motion.

In early August 2005, BCB filed a motion to set aside the trial court's ruling and a response to the Appellants' motion to vacate. In the response, BCB alleged that the Secretary of State's website lists Lexus's address (and the address of Snider, its registered agent) as Nashville, Indiana, and that

none of the correspondence tendered by [BCB's] counsel to the [Appellants] at the aforesaid Nashville, Indiana address were [sic] ever returned by the U.S. postal service. The only returned items of mail represent the unclaimed service of process issued by the Clerk of the Court. [BCB] would characterize the [Appellants'] failure to claim the certified mail process as attempts to avoid service.

Id. at 93. BCB further alleged that Appellants' "assertion that they somehow lacked knowledge of the pending mortgage foreclosure action is ludicrous and quite simply untrue."

⁴ Although the transcript of the summary judgment hearing indicates that attorney Shean appeared on Appellants' behalf, the only persons the trial court heard and acknowledged were BCB counsel Cade and BCB president Charles Darst. Appellants later alleged that Shean did not receive notice of the hearing and that his address was "incorrectly recorded" by the trial court. Appellants' App. at 82.

Id. at 91. Attached to BCB's response was the following fax transmission dated October 4, 2004, from attorney Barbara Bison Jacobson of Cincinnati, Ohio:

We have been retained to represent Jay Snider in connection with a lawsuit that we understand Bullitt Bank has filed recently. I need to obtain a copy of the complaint and any other filings and to discuss the case, including service of process and other related matters.

Id. at 98.⁵ Also attached to the response was the following letter to Jacobson from BCB counsel Cade, dated October 5, 2004:

I missed you by telephone. Please contact me upon receipt of this letter ... in order that you and I may discuss the above-referenced matter.

I enclose herewith for your reference a copy of the Complaint and summons filed and issued in the above-referenced matter relative to your client, Lexis [sic] Real Estate Group, Inc. and Hiram J. Snider. It is my understanding that you shall file Answers on behalf of the two aforesaid defendants. I would like to discuss this matter with you just as soon as possible.

Id. at 99.⁶ Jacobson never entered an appearance or filed an answer on Appellants' behalf.

On August 9, 2005, the trial court held a conference and allowed the parties to submit additional documentation. On August 22, 2005, Appellants filed a brief in support of their motion to vacate judgment. On August 23, 2005, BCB filed an affidavit from Neil Alioto, "an investigator and process server who performs work for [BCB] on occasion[,]” which stated that Alioto had spoken with Snider during the pendency of the foreclosure action but was informed on October 4, 2004, by Jacobson that she represented Snider and that Alioto should “cease any contact” with him. *Id.* at 119-20. On August 23, 2005, the trial court

⁵ Jacobson sent her fax to an attorney in Shepherdsville, Kentucky, who forwarded the document to BCB counsel Cade. Appellants' App. at 98, 99.

⁶ Cade's letter was sent to Jacobson via both regular mail and fax. Appellants' App. at 99. Appellants do not claim that Jacobson did not receive Cade's response.

granted BCB's motion to set aside, thereby reinstating the default judgment and judgment and decree of foreclosure against Appellants. This appeal ensued.

Discussion and Decision

On appeal, we give a trial court's decision whether to reinstate a default judgment substantial deference. *Core Funding Group, LLC v. Young*, 792 N.E.2d 547, 550 (Ind. Ct. App. 2003), *trans. denied*.

Our standard of review is limited to determining whether the trial court abused its discretion. We will find an abuse of discretion if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. In reviewing the trial court's determination, we will not reweigh the evidence or substitute our judgment for that of the trial court. Any doubt as to the propriety of a default judgment is resolved in favor of the defaulted party.

Default judgments are not favored; it has long been our preference that a court decide a controversy before it on its merits.

Id. (citations omitted).

Much of Appellants' brief is devoted to the adequacy of BCB's service of process *vis-à-vis* the trial court acquiring personal jurisdiction over Appellants and affording them the due process guaranteed by the Fourteenth Amendment to the U.S. Constitution. Regarding the former, we have stated that "[i]f service of process is inadequate, the trial court does not acquire personal jurisdiction over a party, and any default judgment rendered without personal jurisdiction is void." *King v. United Leasing, Inc.*, 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002); *see also* Ind. Trial Rule 60(B)(6) (allowing relief from void default judgment). "Unclaimed service is insufficient to establish a reasonable probability that the defendant received adequate notice and to confer personal jurisdiction." *King*, 765 N.E.2d at 1290.

As for the latter, the U.S. Supreme Court has stated, “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). “[W]hen notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* at 315.

With respect to both personal jurisdiction and due process, this Court has stated,

If the summons or service thereof is *not* “reasonably calculated to inform ...,” the mere fact that the party served has actual knowledge of the suit does not satisfy due process or give the court in personam jurisdiction. Conversely, if the summons and service thereof *are* “reasonably calculated to inform,” the fact that the party served lacks actual knowledge of the suit does not defeat the jurisdiction thus acquired.

Glennar Mercury-Lincoln, Inc. v. Riley, 167 Ind. App. 144, 152, 338 N.E.2d 670, 675 (1975) (citations omitted), *trans. denied*.

We agree with Appellants that BCB’s unsuccessful attempts to serve them at the Nashville, Indiana, address and via publication were inadequate to confer personal jurisdiction over the Appellants and afford them due process. Quite frankly, we are troubled by BCB’s decision not to serve Appellants at the Shelbyville, Kentucky, address listed on the

loan documents and the loan payoff calculation.⁷ BCB's conduct indicates that it was not "desirous of actually informing" Appellants of the lawsuit. We are even more troubled by counsel's misleading representations regarding BCB's knowledge of Appellants' whereabouts and admonish counsel to refrain from similar conduct in future cases.⁸

As for the copy of the complaint and summons that BCB sent to attorney Jacobson at her request in October 2004,⁹ Appellants contend that BCB was also required to notify Jacobson that it was filing for default judgment. Appellants' Br. at 14 (citing *Smith v. Johnston*, 711 N.E.2d 1259 (1999)).¹⁰ *Smith* involved a medical malpractice claim. In the

⁷ BCB insists that it "is entitled to rely upon the representations by [Appellants] to the [Indiana] Secretary of State regarding the status and location of the organization, its representatives and officers." Appellee's Br. at 9. This argument ignores the fact that BCB had actual knowledge of Appellants' Kentucky address and failed to act on this knowledge either before or after the Indiana summonses were returned unclaimed.

⁸ For purposes of this opinion, we need not determine whether BCB counsel's misrepresentations entitle Appellants to relief pursuant to Trial Rule 60(B)(3). *See* Ind. Trial Rule 60(B)(3) (allowing relief from default judgment based on "fraud ..., misrepresentation, or other misconduct of an adverse party").

⁹ Appellants claim that the letters from Jacobson and BCB's counsel are "not properly before the Court because no affidavit accompanied them." Appellants' Br. at 14. Appellants cite no authority for this proposition and never asked the trial court to strike them; consequently, we rely on them for purposes of this appeal. We note that Jacobson's letter contradicts Snider's averment that he did not become aware of the lawsuit until after default judgment was entered.

¹⁰ BCB asserts that it perfected service on Appellants via Jacobson pursuant to Indiana Trial Rule 4.1(A)(4). Appellee's Br. at 11; *see* Ind. Trial Rule 4(A) ("The court acquires jurisdiction over a party or person who under these rules ... is served with summons ..."); Ind. Trial Rule 4.1(A)(4) (authorizing service "upon an individual, or an individual acting in a representative capacity, by ... serving his agent as provided by rule, statute or valid agreement"). Appellants do not respond to BCB's assertion, but instead claim only that BCB was required to notify Jacobson that it was filing for default judgment. Appellants' Reply Br. at 3. We note that Trial Rule 4.1(B) states that whenever service is made under Trial Rule 4.1(A)(3) or -(4), "the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return." Notwithstanding BCB's reliance on Trial Rule 4.1(A)(4), Appellants do not mention Trial Rule 4.1(B), let alone contend that BCB failed to comply therewith or that such failure would require reversal. Consequently, Appellants have waived any argument on this point. *See Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006) ("It is a cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment.").

medical review panel proceedings, both parties were represented by counsel. After the panel found that defendant physician Smith had “failed to comply with the appropriate standards of care[,]” plaintiff Johnston’s counsel sent a letter to Smith’s counsel “demanding the policy limits in settlement.” *Smith*, 711 N.E.2d at 1261. After waiting one month for a response, Johnston’s counsel filed suit against Smith. When she returned from the courthouse, Johnston’s counsel found a letter from Smith’s counsel rejecting the settlement demand.

Smith was served with process via certified mail on January 11, 1996. A scrub nurse signed for the summons, but no appearance was entered on Smith’s behalf. Johnston’s counsel made no efforts to contact Smith’s counsel. On February 20, 1996, Johnston’s counsel moved for default judgment. The trial court granted a default judgment on liability the next day and set a hearing on damages for March 22, 1996. On that date, the trial court entered judgment in the amount of \$750,000 plus costs. The judgment was served on Smith but not on Smith’s counsel. Six days after judgment was entered, Smith’s counsel filed an appearance and moved to set aside the default judgment pursuant to Indiana Trial Rule 60(B)(1) for excusable neglect based on a “breakdown in communication” and pursuant to Trial Rule 60(B)(3) for misconduct by Johnston’s counsel based on her failure to “provide a copy of the complaint and subsequent papers to Smith’s attorneys when she knew Smith was represented by counsel.” *Id.* The trial court denied Smith’s motion, and this Court affirmed.

On transfer, our supreme court concluded that Smith’s failure to read his mail was not excusable neglect as contemplated by Trial Rule 60(B)(1) but held that “a default judgment obtained without communication to the defaulted party’s attorney must be set aside where it is clear that the party obtaining the default knew of the attorney’s representation of the

defaulted party in the matter.” *Id.* at 1262. In so holding, the *Smith* court relied on the Rules of Professional Conduct:

The Rules are guidelines for lawyers and do not spell out every duty a lawyer owes to clients, the court, other members of the bar and the public. The preamble to the Rules is clear that “[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Thus lawyers’ duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid compromising the integrity of his or her own reputation and that of the legal process itself. These considerations alone demand that [Johnston’s counsel] take the relatively simple step of placing a phone call to [Smith’s counsel] before seeking a default judgment.

In addition, Rule 8.4(d) explicitly states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. *The administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment.* A default judgment is appropriate only where a party has not appeared in person or by counsel and, if there is a lawyer known to represent the opposing party in the matter, counsel had made reasonable effort to contact that lawyer.

....

[Johnston’s counsel] argues that she had a duty to her client to seek the default judgment after Smith failed to respond. Whether or not she had duty to file for default as soon as the time limit expired, that duty did not preclude her from notifying Smith’s attorneys of the suit at the time of filing or when she moved for default. Any lawyer’s duty to advance her client’s interest is circumscribed by the bounds of the law and her ethical obligations.

Id. at 1263-64 (emphasis added).

In this case, BCB notified Jacobson—albeit after Jacobson contacted BCB—that a lawsuit was pending against Appellants two months after it filed suit and nearly five months before it sought a default judgment. Given these circumstances, BCB fulfilled its burden under *Smith*: to give Jacobson “notice of the lawsuit prior to seeking a default judgment.” *Id.* at 1264. *Smith* does not relieve a defendant’s attorney of the burden of exercising due

diligence. Once BCB notified Jacobson of the lawsuit, she had five months to enter an appearance, file an answer, and check the trial court's docket on Appellants' behalf. Jacobson did none of those things. Consequently, we cannot say that the trial court abused its discretion in reinstating the default judgment and judgment and decree of foreclosure against Appellants. We therefore affirm.

Affirmed.

KIRSCH, C. J., and BAILEY, J., concur.